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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-673.

GETTY OIL COMPANY (EASTERN OPERATIONS), INC., a Delaware Corporation,

Petitioner,

v.

WILLIAM D. RUCKELSHAUS, as Administrator of the Environmental Protection Agency, and the ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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SUMMARY OF ARGUMENT.

The Government in its Answering Brief has chosen to ignore rather than answer the questions presented in the Petition for Certiorari. The brief omits any reference to, or discussion of, the statute under which the Administrator here purported to act. 42 USC § 1857c-8(a)(4). (Pet. p. 4). It relegates the National Environmental Policy Act (NEPA) question (Pet. p. 3) to an arbitrarily placed footnote. It fails to identify any compelling governmental interest sufficient to justify summary disposition of the compliance order without a due process hearing prior to enforcement. The Government evidently hopes the Court will draw the conclusion that the arguments it ignores are not worthy of rebuttal. In fact, the Government has chosen not to discuss the questions presented by this Petition because of its inability to deal with the questions presented in a convincing way.

ARGUMENT.

1). The Administrator totally ignores the provisions of 42 USC § 1857c-8(a)(4) which provides in pertinent part that:

> "Any order issued under this subsection shall state with reasonable specificity the nature of the violation, specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements."

The Administrator argues that since this is a case of clear violation that his hands are tied and he must order immediate compliance. But that is simply not so. It is not what the statute, *supra,* provides for. The statute says

that after you have a violation then the Administrator must still fix a reasonable compliance schedule (not immediate compliance); that the Administrator must consider the *seriousness* of the violation and that he must consider the *good faith* efforts to comply. The statute grants the Administrator discretion to grant a violator future time to comply where the violation is not serious in its effect on the public and where the violator is making and has made good faith efforts to comply.

The Administrator would have the Court believe that Regulation VIII absolutely ties his hands. But that it is not how the Administrator acted in the *Allied* case. (Pet. A54-58). The Administrator in his Answering Brief ignores *Allied,* and with reason. Allied was denied a variance in the same opinion as was Getty by Delaware's Secretary of Natural Resources and Environmental Control. (Appellant's Appendix, Court of Apps., Swayze Aff., Ex. D., p. 68a). Allied was in clear violation of a regulation that became effective on the same date as the regulation involved here. Allied exists in the same ambient air as Getty, New Castle County, Delaware, yet Allied was granted a 20½ month extension from January 1, 1972 under 42 USC § 1857c-8(a)(4). If the Administrator's discretion could be granted in favor of Allied, why not Getty? The Government's brief is silent on this point. Indeed at the argument before the Court of Appeals, the Government's attorneys claimed to know nothing about the Allied matter at all.

The Government's brief asserts that since many of the arguments we advance under 42 USC § 1857c-8(a)(4) could also have been advanced in a § 307 petition that the Administrator's exercise of discretion under § 1857c-8(a)(4) is non-reviewable. This is a non sequitur. How could the exercise of his discretion have been reviewed by the Court of Appeals before he had exercised it?

The Government's reliance on cases under the Motor Vehicle Safety Act (GB p. 10, n. 6) is inapt. As the District Court observed, the Clean Air Act is not similar to the Motor Vehicle Safety Act. (Pet. A17 n. 10). The Clean Air Act does not set up nationwide regulations of general application. Rather, within certain guidelines it delegates to each state the responsibility to develop and handcraft for its region its own plan and regulations, and the emphasis is on flexibility. A reading of the Clean Air Act reveals the many opportunities for changes and adjustments in what is admittedly a complicated field. One avenue for adjustment is the state variance procedure which Getty pursued. Another opportunity for flexibility based on the stated criteria of the seriousness of the violation and good faith efforts to comply is provided for by § 1857c-8(a)(4).

2). The Administrator similarly avoids reference to *Abbott Laboratories v. Gardner,* 387 U. S. 136, 87 S. Ct. 1057, 18 L. Ed. 2d 681 (1967). Once the Administrator's discretion becomes apparent as it must upon analysis of § 1857c-8(a)(4), jurisdiction follows under the Administrative Procedure Act as interpreted by *Abbott* and others, as the District Court held (Pet. A13-21). Moreover, an independent basis of jurisdiction clearly exists under NEPA. In addition to the cases cited in our Petition (Pet. p. 16) on this point, Judge Winner recently reached the same conclusion in ***Anaconda v. Ruckelshaus,*** 4 ERC 940 (D. Colo. Dec. 18, 1972).

3). The Administrator's treatment of our claim to a due process hearing is similarly cavalier. Like the Court of Appeals, he fails to explain where we could have received a hearing on the exercise of the Administrator's discretion under § 1857c-8(a)(4). He fails to cite facts supporting a

compelling public interest in summary enforcement on the particularized facts of this case. Both the District Court and Court of Appeals recognized the absence of any such interest by staying enforcement pending judicial review. This stay remains in effect. Further, the Administrator asserts that if such a hearing were held, Petitioner would not prevail. Plainly the record in this case does not support such an assertion in view of the undisputed testimony concerning the high quality of the air and the tremendous economic impact without any corresponding public benefit. Surely this is not a frivolous challenge of the kind the Government refers to at GB p. 14. However, a party's right to a due process hearing is not dependent upon a showing that he will prevail. *Coe v. Armour Fertilizer Works,* 237 U. S. 413 at 424, 59 L. Ed. 1027 at 1031-32, 35 S. Ct. 625 (1915) and *Fuentes, et al. v. Shevin, et al.,* and *Parham, et al. v. Cortese, et al.,* — U. S. —, 32 L. Ed. 2d 556, 92 S. Ct. — (1972).

4). The Administrator's answer to the attack on his failure to prepare and circulate an environmental impact statement (GB p. 14 n.9) is singularly without case or legislative support. He fails to comment on the large number of decisions interpreting NEPA in accordance with its clear language, to mean that every federal agency must prepare impact statements where applicable. Since our Petition was filed, several recent cases have been decided which further strengthen our position and conflict with the Third Circuit's opinion in this case. We refer to *Anaconda v. Ruckelshaus, supra,* which held that NEPA was applicable to the EPA at the rule making stage and to *Morton v. Davis,* 4 ERC 1735 (10th Cir. Nov. 24, 1972) which held NEPA was applicable to the Department of Interior's approval of the Pueblo Indian tribe's lease of Indian land to a commercial developer. Using an argument which has

become increasingly popular with government agencies, the Bureau of Indian Affairs contended that Congress never intended that the Bureau be included under NEPA. The Court of Appeals rejected this contention noting that NEPA "directs all agencies to present a detailed statement on the environmental impact of the proposed action." *Ibid.* at 1736. The Court held, "[A]s our Court had occasion to consider once before, this Act [NEPA] was intended to include all federal agencies, including the Bureau of Indian Affairs." *Ibid.* at 1738. The Court of Appeals then addressed the narrower contention that the provision of 25 USC § 415 that ". . . the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to . . . the effect on the environment of the uses to which the lease land will be subject" was intended by Congress to supplant NEPA. The lower court held that NEPA did not apply to Indian lands or otherwise 25 USC § 415 would not have addressed the problem of environmental concerns. The Court of Appeals found this conclusion to be erroneous. The Court of Appeals in reversing the findings of the lower court held that, "unless the obligations of another statute are clearly mutually exclusive with the mandates of NEPA, the specific requirements of NEPA will remain in force." *Ibid.* at 1738.

Indeed there can be little doubt, that Congress did not intend the EPA to be exempt from the provisions of NEPA under the Clean Air Act in light of the specific exemption contained in the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, § 511, which exempts only the EPA's activities under that Act. The EPA sought a general exemption from Congress and failed to get it. The fact that Congress included an exemption in the Water Act and not in the Clean Air Act is indicative of Congress's intention that the activities of the EPA under the Clean Air Act be subject to NEPA's requirements and *Anaconda v. Ruckelshaus, supra,* so holds.

CONCLUSION.

For the reasons stated in the Petition for a Writ of Certiorari and herein, it is respectfully submitted that the Petition should be granted.

Respectfully submitted,

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